Supreme Court, U.S.
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No. 04-66

IN THE

Supreme Court of the United States

Abdela Tum,

Petitioner,

v.

Barber Foods, Inc.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONERS

Respondents do not dispute that the circuits are divided on the principal issues raised by the petition for certiorari: whether *walking* and *waiting* time associated with safety equipment distribution is compensable work under the Fair Labor Standards Act. *See* Pet. 5-7. Nor do they contest that these issues are sufficiently important to merit this Court's resolution: the circuit split creates unacceptable financial uncertainty for employers and employees across the country, and often causes employees of the *same company* in the same job category, but in different locations, to receive different compensation. *See* Pet. 11-12. Nor, finally, do they disagree that this case, particularly if reviewed together with No. 03-1238, *IBP, Inc. v. Alvarez*, is the best available vehicle for this Court's resolution of these questions. *See* Pet. 12-13. Instead, respondents simply argue that the court below was so obviously correct on the merits that other courts of appeals will no doubt be convinced and the circuit split will resolve itself. That expectation is unrealistic and does not constitute a serious argument against certiorari.

In any event, respondents' view of the merits is wrong. The Labor Department's "continuous workday" rule is supported by the text and history of the FLSA and Portal-to-Portal Act. And respondents offer no justification for the court of appeals' refusal to defer to the Labor Department's interpretation, other than an assertion that the regulations are themselves ambiguous. But that argument is not only based on an insupportable reading of the regulations; it also ignores the Department's own interpretation of the regulations. Moreover, even apart from the "continuous workday" rule, walking and waiting for safety equipment are compensable because they are necessary to enable employees to perform the duties for which they are hired.

As to two other issues raised by the petition, respondents do challenge the basis for this Court's review, but their contentions are meritless. First, respondents claim that there

is no circuit split on the important question whether time spent donning and doffing equipment required by the nature of an employee's job, but not formally required by an employer or by law, is compensable. But they do not dispute that the court of appeals' view that such time was not compensable was expressly rejected by the Sixth Circuit in *Steiner v. Mitchell*, 215 F.2d 171, 174-75 (1954), and also contradicts this Court's decision affirming the Sixth Circuit in that case, 350 U.S. 247 (1956). Second, respondents observe that the court of appeals did not reach the final question: whether a characterization of the otherwise compensable donning and doffing time as "*de minimis*," when taken alone, means that walking and waiting time associated with that donning and doffing is noncompensable. However, if this Court were to reverse the court of appeals' holdings, it *would* have the opportunity to reach that issue and resolve the considerable confusion that has plagued the lower courts' application of the "*de minimis*" rule.

I. The Circuit Conflict Concerning Walking And Waiting Time Is Unlikely To Be Resolved By Further Percolation, And Merits This Court's Review Now.

Respondents do not dispute that the court of appeals' decision on the question of walking and waiting time squarely conflicts with that of other circuits in two respects. First, the court of appeals held that time spent walking to and from safety equipment distribution stations was not compensable under the Portal-to-Portal Act, 29 U.S.C. 254(a)(2), because it was merely "preliminary or postliminary." Pet. App. 8a-10a. Second, the court of appeals held that time spent *waiting* at those stations was not compensable for the same reason. Pet. App. 11a. Both these holdings squarely conflict with those of the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (2003). *See id.* at 906-07 (walking time); *id.* at 903, 904 (waiting time). The Tenth Circuit took a third approach in *Reich v. IBP, Inc.*, 38 F.3d 1123 (1994), holding some waiting time compensable but deeming other waiting and walking time

noncompensable because it was not continuous with employees' other work activities. And the Fifth and Eleventh Circuits have likewise reached waiting time holdings that conflict with that of the court of appeals. See Pet. 7 (citing *Mireles v. Frio Foods*, 899 F.2d 1407, 1411 (CA5 1990); *Cole v. Farm Fresh Poultry*, 824 F.2d 923, 929 & n.6 (CA11 1987)).

There is no reason to expect that further percolation in the courts of appeals will resolve this broad conflict. Respondents' position that the purported correctness of the First Circuit's analysis will soon persuade all *four* of the circuits that have adopted at least partially contrary views would be unrealistic even if respondents were right on the merits. The First Circuit, meanwhile, seems unlikely to change *its* position, having just reaffirmed it after rehearing the case following the *Alvarez* decision. Nor will waiting for other circuits to weigh in help; as is demonstrated by the scattershot approaches of those circuits that have already decided the interrelated questions presented by the petition, additional appellate rulings are likely simply to compound and further entrench the confusion.

Furthermore, the First Circuit was wrong on the merits of both questions. First, walking and waiting time are both compensable if they fall within the "continuous workday" that runs between the first and last compensable activities of the day (for instance, the donning and doffing that the First Circuit itself deemed compensable). See Pet. 14-18. The "continuous workday" rule is the considered position of the Department of Labor, embodied in interpretive regulations, and merits deference. *Id.* at 24-28. Respondents maintain that the regulations "cut both ways," and that, specifically, the regulation stating that the walk between the plant entrance and the employee's workstation is noncompensable undercuts the Labor Department's view regarding the compensability of other walking time. BIO at 10. But the fact that the Department's regulations unsurprisingly exclude the *specific period of walking time* that is *expressly deemed*

noncompensable by the Portal-to-Portal Act, see 29 U.S.C. 254(a)(1), does not contradict the Department's position that *other* periods of walking time occurring within the bounds of the "workday" *are* compensable. The statute leaves the latter question open, and the Department has offered a reasonable interpretation, one that *precisely tracks* this Court's own interpretation, *see Steiner*, 350 U.S. at 256 (holding that, in addition to activities not satisfying the "integral and indispensable" test, those activities "specifically excluded by Section 4(a)(1)" are not compensable work), and that recognizes that Congress is unlikely to have intended the administrative inconvenience of repeatedly stopping and restarting the "workday" clock. More to the point, as respondents do not dispute, the court of appeals' attempt to resolve an imagined conflict within the regulations directly contradicts the Department's *own* interpretation of its own regulations – an interpretation to which the court of appeals inexplicably gave no deference whatsoever. *See* Pet. 27-28.

Even setting aside the "continuous workday" rule, petitioners' donning and doffing activities clearly satisfy the "integral and indispensable" requirement established by this Court in *Steiner*: they are essential to enable petitioners to do the jobs they are hired to do. Respondent's sole response to this point is that it "conflates the test for determining whether an activity is an integral and indispensable part of the employees' principal activities with the test for determining whether an activity constitutes 'work.'" BIO 12. That is false; it is *respondents* who are guilty of that conflation. Contrary to respondents' implication, this Court's decision in *Tennessee Coal, Iron, & Railroad Co. v. Muscoda* did not define "work" to mean activities "necessary to the principal work performed and done for the benefit of the employer," BIO 12. Instead, it defined it as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." 321 U.S. 590, 598 (1944). It was *Steiner*, interpreting the intervening Portal-to-

Portal Act, that added the requirement that, in order to be "*compensable* work," an activity had to be not only performed for the employer's benefit, but also "an integral and indispensable part of the *principal* activities for which covered workmen are employed." 350 U.S. at 256 (emphasis added).[1] If petitioners' walking and waiting time satisfies that standard – and respondent does not deny that it does – it indisputably satisfies the Portal-to-Portal Act. Respondent's assertion that "the fact that certain activities are necessary to the principal work performed and done for the benefit of the employer does not automatically transform those activities . . .

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[1] Petitioners' argument therefore does not "render the Portal Act superfluous." BIO 13. The Portal-to-Portal Act limited the preexisting standards set by *Tennessee Coal* and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946), in two ways: it expressly excluded from compensation, in § 254(a)(1), travel time "to and from the actual place of performance of the principal activity"; and it excluded work that was done for the *benefit* of the employer, and controlled or required by the employer, but was not integral and indispensable to the employee's *primary* job activities. This latter distinction is a meaningful one. For instance, the Act excludes time spent punching in on a time clock, see 29 C.F.R. 790.7(g) – an activity required by the employer, which serves the employer's administrative needs, but which has nothing to do with actually enabling the employee to perform the primary job task (*e.g.*, meatpacking) that he is hired to do. Time spent donning and doffing safety equipment that is necessitated by the nature of the job, in contrast, is essential to enable the employee to perform that primary task, as this Court recognized in *Steiner*. And time employees spend walking and waiting to obtain that equipment is thus also integral and indispensable to their primary job duties.

Respondent misleadingly states that *Mt. Clemens* "reject[ed] a claim spent waiting in line to punch a time clock," BIO 15, implying that such claims were invalid even before the Portal-to-Portal Act. In fact, the Court expressly stated that that issue was not presented, see 328 U.S. at 691, and, if anything, its rationale – *inter alia*, that it would be unfair to credit two employees arriving at work simultaneously with different amounts of working time simply because one got through the line, and to the work floor, faster – implies that waiting time *should* be compensable work. *Id.* at 689-90.

to compensable integral and indispensable activities," BIO 13, ignores *Steiner*'s express holding.

II. The Court Of Appeals' Holding That Time Spent Donning And Doffing Safety Equipment Functionally Required By The Nature Of The Job Is Noncompensable Conflicts With The Holdings Of Other Courts Of Appeals And Of This Court.

The court of appeals erroneously held that the time petitioners spent donning and doffing equipment that is critical to enable them to perform their jobs safely is noncompensable because the employer imposed no formal requirement that petitioners use the equipment. Respondents, who misleadingly characterize this equipment as "optional," do not contest that this case provides an ideal vehicle to consider this question, which – like the waiting time and "*de minimis*" issues – is not presented by the *Alvarez* petition. See Pet. 12-13.

Instead, respondents assert that there is no circuit conflict on this question, but they do not even mention the Sixth Circuit's holding in *Steiner*, 215 F.2d 171. In that decision, the Sixth Circuit squarely rejected exactly the distinction for which respondents now argue – that between formally required equipment and functionally required equipment. *Steiner* was affirmed by this Court, and the court of appeals' decision remains good law in the circuit.

Moreover, especially taken in the context of the Sixth Circuit's direct holding on the issue, this Court's *Steiner* opinion cannot be taken as anything other than a rejection of the position taken by the court of appeals here. *Steiner* held that "*all* activities which are 'an integral and indispensable part of the principal activities'" are compensable, 350 U.S. at 253, not just those formally required by the employer. Furthermore, the rule respondents propose would have led to a different result on the facts of *Steiner* itself. See Pet. 22-23.

Respondent attempts to evade this conclusion by falsely claiming that this equipment is "worn as a matter of discretion

for personal comfort and convenience." BIO 18. The "optional" equipment at issue in this case (some of which was formally required for some job categories but not others) included "vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, steel-toed boots, rain pants, steel mesh gloves, and lockout-tagout equipment." Pet. App. 23a-24a. The notion that employees wear (for instance) back belts and steel mesh gloves because they are *comfortable* is simply untenable. Rather, they wear them because they are necessary to permit them to do their jobs safely – just as the employees in *Steiner* did. Even the court of appeals acknowledged that the equipment in question "promotes safety and sanitary conditions." *Id.* 8a.

Moreover, although *Alvarez* does not directly address respondent's argument, the First Circuit's holding here also conflicts with the result in that case, in which the Ninth Circuit affirmed the district court's holding that time spent donning and doffing at least one piece of equipment not required by the employer – back belts (also called weight belts) – was compensable. See *Alvarez*, 2001 U.S. Dist. LEXIS 25344, at *36 (E.D. Wash.) (deeming "weight belts" compensable); *Alvarez*, 339 F.3d at 898 n.2 (observing that "many employees opt to wear weight-lifting-type belts to prevent back injury"). Notably, the First Circuit denied compensation for time spent donning and doffing back belts even though they were *required* for several job categories, see Pet. App. 24a, which belies respondent's unfounded assertion that donning and doffing the types of equipment at issue in this case would not have been deemed compensable by other courts. See also *Reich*, 38 F.3d at 1124-25 (holding time spent donning and doffing equipment including "polar sleeves, rubber boots," and "a weight belt" compensable when employees' job conditions made such equipment necessary).[2]

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[2] All of these three items are at issue in this case. Pet. App. 24a-25a. Moreover, neither this Court nor the Sixth Circuit in *Steiner* attached any

III. This Case Properly Presents The Issue Of Aggregation Of Time For Purposes Of The "*De Minimis*" Rule, Which Has Divided The Circuits And Merits This Court's Review.

Respondent does not contest that the issues surrounding proper application of the "*de minimis*" rule, including how individual activities are to be aggregated and whether a "*de minimis*" activity can trigger the running of the "continuous workday," have caused widespread confusion and division in the courts of appeals, nor that this conflict merits this Court's review. See Pet. 7-10. Instead, it argues only that this issue was not addressed by the court below.

Because the court below refused to apply the "continuous workday" rule, and because it deemed most of petitioners' activities noncompensable to begin with and therefore had no opportunity to aggregate them for the purposes of the *de minimis* rule, it did not need to address either of these questions. Notably, however, the court did specifically request briefing on the issue, see Order of Aug. 18, 2003 (CA1), and Judge Boudin's concurrence did identify the *de minimis* rule as an alternate ground for the court's holding. Pet. App. 18a-19a. Petitioners do not, of course, argue for certiorari *exclusively* for the purpose of resolving these questions. But if the Court grants certiorari on any of the other issues presented here, it will have an opportunity to resolve them. *See* Br. of United States in *IBP, Inc. v. Alvarez*, No. 03-1238, at 7-12 (observing that *Tum*, unlike *Alvarez*, raises a "question of considerable significance to the administration of the FLSA – whether donning and doffing time should be considered together with walking time in assessing whether the time devoted to those activities is *de minimis*").

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significance to the *kinds* of clothes plaintiffs were taking on and off, so long as their changing clothes was functionally required for job safety.

The issues surrounding the *de minimis* rule are closely intertwined with the other questions presented by this case. In order to apply the "continuous workday" rule, for instance, it will be essential for courts to understand *what* activities mark the start or stop of the workday, as Judge Boudin's concurrence makes clear. Furthermore, the district court in this case granted summary judgment to respondents on the compensability of walking, waiting, and some donning and doffing time; it sent petitioners' other donning and doffing claims to the jury, which found them, *standing alone*, to be *de minimis*. If the court was wrong to grant partial summary judgment, however, then the question is squarely presented whether *all* petitioners' claims, including those already sent to the jury, merit a new trial. For if petitioners are right about the aggregation issue, then the original jury was presented with the wrong question; it should have been asked whether *all* petitioners' donning, doffing, walking, and waiting time, taken together, was more than *de minimis*. And if even a *de minimis* activity can trigger the start of a "continuous workday," then the jury's finding is likewise irrelevant.

This Court may consider these issues in the first instance. First, as Judge Boudin's concurrence makes clear, the *de minimis* issue would (if respondents prevailed on it) constitute an alternative basis for upholding the court of appeals' judgment even if petitioners prevailed on the other issues they raise here, and this Court therefore has jurisdiction to reach the question. *See, e.g., Granfinanceria, S.A. v. Nordberg*, 492 U.S. 33, 38-40 (1989). Of course, this Court ordinarily declines review as a discretionary matter if the alternative ground is not an issue "of sufficient general importance to justify the grant of certiorari," *United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975), but here the issue is sufficiently important, as respondents do not contest. And although this Court often properly exercises its discretion not to resolve such questions in the first instance, here several factors combine to weigh in favor of this Court's resolution: the close intertwining of the issues; the presence of a wide

and deep circuit conflict ripe for this Court's review; the fact that the issue was thoroughly briefed and argued below in response to the court's request; and that it was the subject of a lengthy discussion in a concurring opinion.

CONCLUSION

For the foregoing reasons and those explained in the petition, this Court should grant certiorari and reverse the judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

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